No. 15933

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

LEWIS F. BLAGG,

Appellant,

vs

IRVING I. BASS, Trustee in Bankruptcy of the Estate of Lewis F. Blagg, Bankrupt,

Appellee.

APPELLEE'S BRIEF.

C. E. H. McDONNELL,
548 South Spring Street,
Los Angeles 13, California,
Attorney for Appellee.

FILED
AUG 18 1958
PAUL P. O'BRIEN, CLERK

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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ARGUMENT.

I.

The Referee Correctly Determined That Appellant Was Not Entitled to a Homestead in the Amount of $12,500.00.

The factual situation presented here, and outlined at length in appellant's brief, is simple: the bankrupt Blagg, on December 19, 1956, filed a declaration of homestead with the County Recorder of Los Angeles County in which he claimed the right to an exemption of $12,500.00 on the theory that he was then "head of a family." The referee's task in the first instance, then, was to determine whether or not the facts were such as to bring this case truly within that declaration.

The referee has found [see Tr. p. 19]:

> "From at least September, 1956, to and including May 8, 1957, the date of the hearing herein, Roberta Blagg, the minor daughter of the bankrupt herein, has not resided with her father, Lewis F. Blagg, upon the premises claimed as homeland (*sic*) as the head of a family located at 11042 West Hondo Parkway, Temple City, California, but, on the contrary, the care, custody and control of said minor child has by judicial decree been awarded to her mother and she has during all of such period resided with her maternal grandmother and the bankrupt has not supported or maintained said minor child during the said period."

It is obvious from the evidence appearing in the record that the bankrupt is attempting to bring himself within the statutory definition of "head of a family" based upon the residence of his twelve-year-old daughter, Roberta. The applicable law is found in Section 1261 of the California Civil Code which defines what is meant by the phrase "head of a family" as used in California Civil Code, Section 1263:

> "The phrase 'head of a family,' as used in this title, includes within its meaning:
>
> * * * * * * * *
>
> 2. Every person *who is residing on the premises with him or her,* and under his or her care and maintenance, either:
>
> (a) His or her minor child, or minor grandchild, or the minor child of his or her deceased wife or husband; * * *" (Emphasis supplied.)

When is one "residing" on the premises as that term is used in California Civil Code, Section 1261? Research has failed to reveal a single case which interprets that

word in connection with the homestead statutes of the State of California. "Residing" is, however, a fairly common word, frequently used in other statutory contexts.

California courts have construed, in other contexts (see Cal. Code Civ. Proc., Sec. 395) the word "residing" to mean to "live," "dwell," "abide," "sojourn," "stay," "remain," or "lodge in a given place." (See *Bohn v. Betty Biscuits, Inc.,* 26 Cal. App. 2d 61; *Western-Knapp Engineering Co. v. Gilbank,* 129 F. 2d 135.)

Whether or not, then, a person "resides" on the premises under California Civil Code, Section 1261, is a question of fact. It appears now to be settled that determinations of facts by a referee, and as adopted by the District Court, are to be accepted upon appeal unless those findings are clearly erroneous. (See Baukruptcy General Order 47; *Ott v. Thurston* (C. C. A. 9th), 76 F. 2d 386; also *In re Kossach,* 135 Fed. Supp. 884.)

Respondent submits that the finding of the referee was supported by substantial evidence on the question of the lack of "residence" of Roberta with her father. Consider the following uncontradicted facts:

(1) Shortly after the wife obtained an uncontested Nevada decree of divorce in May, 1955, Roberta was sent, unaccompanied, to Turlock, California, there to live with her *maternal* grandmother.

(2) Since first being dispatched to Turlock, California, Roberta has come home only on vacations and was last at home, prior to the hearing, in early September, 1956.

(3) Upon her return to Turlock in September, 1956, Roberta took with her all of the clothes which fit her, leaving behind her in Temple City only such personal items

as which are of no further use to her while residing with her maternal grandmother.

On these facts, Appellee does not see how it can be said that on December 19, 1956 Roberta was either dwelling, abiding, sojourning, staying, remaining, or lodging with her father in Temple City, California; the fact is that she was on December 19, 1956, and had been for many months prior thereto, residing in Turlock, California.

Against this proposition appellant argues that "the referee's decision holding that the declaration of homestead is null and void is predicated upon three propositions." He then cites as the three propositions the following (see Appellant's Op. Br. p. 11):

> "1. That the Declaration does not state that the bankrupt and minor daughter are residing upon the premises at the time of making the declaration' [Certificate of Review, Tr. p. 28];
>
> 2. That the minor child was living with her maternal grandmother 'who has supported and maintained her granddaughter Roberta while living with her' and that 'the father has contributed very little if anything to the care and maintenance and support of his minor daughter since at least September 1956' [Certificate of Review, Tr. p. 29];
>
> 3. That the custody of the said minor child had been awarded to the mother by a Nevada court. [Certificate of Review, Tr. p. 27; see also Find. VII, Tr. p. 19.]"

First of all, it will be noted that all three of the "propositions" are culled from the Referee's Certificate on Review, which is a portion of the record here [Tr. pp. 25-31]. Appellee submits that for appellant to pro-

ceed in this fashion is a misleading misconception of the purpose of the Referee's certificate. Under Bankruptcy Act Section 33 (U. S. C., Title 11, Ch. 5, Sec. 67), the duty of the referee in connection with a certificate on review is clearly set forth:

> "Referees shall * * * (8) prepare promptly and transmit to the clerk's certificates on petitions for review of orders made by them, together with a statement of the questions presented, the findings and order thereon, the petition for review, a transcript of the evidence or a summary thereof and all exhibits; * * *"

Thus, the purpose of the Certificate on Review is simply to supply a summary of evidence to the District Judge for his guidance in considering the matter of review. It is not under the law the only basis of the referee's findings and conclusions—they are based upon all of the evidence educed before him, see *Matter of Pearlman* (C. C. A. 2d), 16 F. 2d 620.

Appellee argues that a correct analysis of the statutes involved here will support the statement of the referee in his certificate that "the declaration does not state that the bankrupt and minor daughter are residing upon the premises at the time of making of the declaration." Consider for a moment California Civil Code, Section 1263, which states as follows:

> "The declaration of homestead must contain:
>
> 1. A statement *showing* that the person making it is the head of a family, * * *"

Now, how does one evince that he is "head of a family"? This is done by compliance with California Civil Code, Section 1261, as previously cited, which defines what is

a "head of a family." Thus, to bring himself within the cited section of California Civil Code, Section 1263, it would have been necessary for the bankrupt to state in this case that the declarant had residing on the premises with him at the time of its execution his minor child Roberta.

On the question of the support of the child Roberta, appellee wishes to call this court's attention to the indefiniteness of the testimony of the bankrupt. No definite sum of money was sent for support [Tr. p. 63]. The bankrupt testified he did not know how much was the average pay for support and for board and room to Clara Sims, Roberta's maternal grandmother [Tr. p. 63]. Neither could the bankrupt recall how much money was sent with Roberta when she went north on the train [Tr. p. 63]. Certainly the conclusion of the referee who saw the witness before him, observed his demeanor should have very strong weight here in determining which portions of the very indefinite testimony given by the bankrupt is to be believed.

As to the award of custody by the Nevada court, whether or not it is legally binding upon the bankrupt, certainly when taken together with the other facts in this case, and in particular with the fact that very shortly after the decree Roberta passed, except for vacation periods, into the house of her maternal grandmother, it is evidence on the question of whether or not Roberta was actually "residing" with her father on the property claimed as a homestead on December 19, 1956.

II.

The Referee and District Court Correctly Determined That the Bankrupt Was Not Entitled to the Homestead Exemption of a Single Man.

The Referee has ruled that inasmuch as the declaration fails as that of the "head of a family," it must likewise be rejected as the homestead of a single man. This proposition is vigorously attacked by the petitioner and there is squarely presented the question: When a declaration of homestead by the head of a family, as that term is defined in California Civil Code, Section 1261, is defective, can the homestead provided by California Civil Code, Sections 1238 and 1266 be sustained?

A complete review of the decisions on this point is most instructive.

Petitioner cites at length *Feintech v. Weaver* (1942), 50 Cal. App. 2d 181. This was an action in which the defendant, Weaver, while residing on real property with an adult son, executed a homestead on the printed form intended for the use of a "head of a family." All the statements required for the declaration of a single person's homestead were included. The only impediment to the allowance of the single person's homestead was the printed language indicating that the defendant, Weaver, was the "head of a family." The court treated the printed language as mere surplusage and granted the homestead as that of a single person. This case relied on *Roth v. Insley,* 86 Cal. 134. There the problem was raised only in a concurring opinion. There the declarant had failed to state that his mother was "under the care and maintenance" of the declarant as required by statute.

Petitioner also relies on the recent case of *Johnson v. Baruner* (1955), 131 Cal. App. 2d 713. This case is

not in point other than for the principle that the homestead law should be liberally construed. It does, however, cite the *Feintech* case with approval on this point. In the *Johnson* case, a declaration of homestead by a wife had been made after a quitclaim deed had been reecived from the husband on joint tenancy property. The declaration of homestead was filed after an attachment but before the execution on a judgment. It was contended that the homestead was defective because it did not state that the homestead was made for the joint benefit of both husband and wife. The Appellate Court applied a liberal rule and upheld the homestead. Thus, there was never presented at all the problem of the allowance of the homestead for other than the "head of a family."

Petitioner fails to cite *in re Mapes* (1954), 120 Fed. Supp. 316. This case was decided by the Honorable Ernest Tolin in the District Court for the Southern District of California, Central Division. There, a trustee in bankruptcy refused to recognize a homestead, whereupon the bankrupt made objections to the report of exempt property, just as was done in the instant case. The Referee rejected the objections and sustained the report of exempt property, disallowing the homestead. In that case, the declaration of homestead was filed by the husband as the head of a family with a wife and two children. The homestead failed to conform to the statutory requirement that the wife be named. Judge Tolin, in a lengthy and able opinion, sustained the Referee and refused to allow the homestead as that of a single man saying at page 317 of 120 Fed. Supp:

> "The bankrupt's theory is that there are two types of homestead allowed by the law of California. First, that prescribed by Section 1263 of the Civil Code

> which is available to heads of families; and, secondly, the type of homestead allowed by Section 1266, Civil Code. * * * The two distinct types of declaration allowed by the two statutes are for diverse classes of declarants. A homestead is either in one class or the other and must couch his declaration in the form prescribed for the class in which he falls."

The court goes on to cite the language in Code of Civil Procedure Section 1266, then adds:

> "Any person *other than the head of a family,* in the selection of a homestead must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a 'declaration of homestead.'" (Emphasis supplied.)

The court relied upon the California case of *Hanson v. Union Savings Bank* (1905), 148 Cal. 157. In that case an action was instituted to quiet title by the purchaser of certain real property at a foreclosure sale. Before the foreclosing mortgage was executed, the holder of the property had made a declaration of homestead which was invalid because the declarant, a married woman, omitted certain material required by the homestead statute. In the quiet title action, the declarant wife contended that the homestead, admittedly invalid as the homestead of a "head of a family" should be allowed as that of a single person. The court rejected this contention, pointing out, as did Judge Tolin, the provision for the homestead for a single person, not the head of a family, by its terms referred to a person in another group than that which was claimed in the "head of a family" homestead.

Respondent contends that the *Feintech* and *Roth* cases, which upon cursory inspection may appear to be contrary to the *Mapes* and *Hanson* cases, are in reality distinguish-

able. A careful reading of the *Feintech* and *Roth* cases will reveal that in these no actual effort was made to assert a "head of a family" homestead. In the *Feintech* case, for example, it is apparent that the declarant simply obtained the wrong printed form and in a layman's ignorance filled it out and filed it. Relief in such a situation is not only understandable but quite proper under the liberal interpretation of homestead law. In the *Mapes* and *Hanson* cases, however, an entirely different situation is presented: In these two instances, every effort was made to assert the larger "head of a family" homestead. It is only after the homestead has failed of its larger purpose that an effort is made to salvage something by contending that the declarant should be put into the other class.

The instant case clearly belongs with the *Mapes* and *Hanson* cases. The bankrupt Blagg first filed, under oath, a declaration of homestead which represented him to be a single man, saying nothing whatever about any other rights as the "head of a family." Immediately thereafter this was abandoned and a new homestead, obviously the result of a second thought, was filed in which the bankrupt Blagg attempts to bring himself under the "head of a family" rule.

Respondent insists that upon principle the rule asserted in the *Mapes* case is correct. The law permits a person to select into which category he believes he belongs—"head of a family" or "single person." It is clear from the language of Code of Civil Procedure Section 1266 that no one can be both at once. If the bankrupt Blagg, for example, chooses to attempt to bring himself under the larger exemption, then thereby he excludes himself from the smaller, and when he fails to qualify he should not be heard to attempt a reclassification.

On theory, this is a proper protection for the creditor community. If the rule of the *Feintech* case is extended to those who deliberately attempt to qualify as the "head of the family" with the thought that if they fail in this they can always salvage the exemption of a "single man," then the possibities of fraud upon the creditor community are obvious. Since the creditor in almost every case must rely upon the statements on the face of the declaration of homestead, the effect of the larger declaration is to make it seem that there is potentially a lesser equity in homesteaded property than may actually be the case. Certainly, it is not too much to demand that those who seek to so impose upon creditors should not be able to later on take the advantage of the lesser homestead exemption when they fail in the claim of the larger.

Conclusion.

Appellee insists that the decision of the referee, and the findings of fact and conclusions of law on which it is based, as sustained by the District Court are correct. There is sufficient evidence to support the referee's findings of fact that determine that the bankrupt and appellant Blagg cannot qualify as the "head of a family" because at the time of the execution of the declaration of homestead Roberta, the daughter of the bankrupt, was not actually "residing" on the premises which are the subject of the asserted homestead.

The referee has also correctly determined, and been correctly sustained by the District Court, that upon failure of the homestead as that of a "head of a family," it must be rejected entirely and cannot be allowed as the homestead of a single man.

Respectfully submitted,

C. E. H. McDonnell,
Attorney for Appellee.